OAH 68-0320-30147

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

Harry Niska,

Complainant,

vs.

Bonn Clayton,

Respondent.

FINDINGS OF FACT, CONCLUSIONS AND ORDER

The above-entitled matter came on for an evidentiary hearing at the Office of Administrative Hearings on February 7 and February 8, 2013, before a panel of three Administrative Law Judges: Jeanne M. Cochran (Presiding Judge), James E. LaFave, and Miriam P. Rykken. On February 15, 2013, the Parties filed post-hearing memoranda. On February 22, 2013, the Complainant filed a reply brief, and on February 26, 2013, the Respondent filed a reply brief.[1] The hearing record closed with the filing of the last submission on February 26, 2013.

David Asp, Attorney at Law, Lockridge Grindal Nauen, PLLP, appeared on behalf of Harry Niska, (Complainant).

Bonn Clayton (Respondent) appeared on his own behalf without assistance of counsel.

STATEMENT OF THE ISSUE

Did Respondent violate Minn. Stat. § 211B.02 by knowingly making statements that falsely implied that three Minnesota Supreme Court candidates had the endorsement or support of the Republican Party of Minnesota?

Did Respondent violated Minn. Stat. § 211B.06 by preparing and disseminating false campaign material that he knew was false or that he communicated with reckless disregard as to whether it was false?

The panel concludes that the Complainant has established that the Respondent violated both Minn. Stat. §§ 211B.02 and 211B.06 with respect to statements made in campaign material he prepared and disseminated.

[1] The Respondent submitted his reply brief by email at 5:04 p.m. on Friday, February 22, 2013. The reply brief was received at the OAH by U.S. Mail on Tuesday, February 26, 2013.

Based on the record and proceedings herein, the undersigned panel of Administrative Law Judges makes the following:

FINDINGS OF FACT

1. Complainant Harry Niska is an attorney and is active in Republican Party of Minnesota (RPM) politics. Mr. Niska was a delegate to the RPM's May 2012 State Convention, as well as the Chair of the Convention's Platform Committee.[2]

2. Respondent Bonn Clayton is a long-time political activist and operative who has been deeply involved in RPM politics for over 50 years.[3] The Respondent is particularly interested in judicial elections and holds himself out as an authority on judicial candidates.[4]

3. Respondent is the Chair of the First Judicial District Republican Committee. The committee works to recruit judicial candidates to run for seats on the district court bench in the First Judicial District. Minnesota has 10 judicial districts. The First Judicial District is made up of Carver, Dakota, Goodhue, Le Sueur, McLeod, Scott and Sibley counties. The RPM permits interested members in each Judicial District to create and organize a committee to recruit judicial candidates.[5]

4. The RPM Constitution provides that if a Judicial District Committee is created, it is strictly auxiliary to the RPM and shall have no other powers except as provided by the RPM Constitution.[6] Judicial District Committees may search for judicial candidates and may call conventions of its Judicial District and endorse for a judicial office in that district.[7]

5. In December 2011, the RPM's State Central Committee approved a $43,462 budget appropriation for the Party's Political department to assist the Judicial District Committees with expenditures, including $462 for costs associated with starting up a new website called judgeourjudgesmn.com.[8]

6. The Judicial District Republican Chairs Committee is made up of the Chairs of the various Judicial District Committees. This committee was formed approximately eight years ago and it coordinates efforts to find judicial candidates for district and appellate courts. The Judicial District Republican Chairs Committee met about once a month and more frequently during the legislative session.[9] Former Chairs of the RPM

[2] Testimony of Harry Niska; Ex. 2.
[3] Testimony of Bonn Clayton.
[4] Niska Test.; Clayton Test.
[5] Testimony of Ben Zierke; Ex. 24 (RPM Constitution at Art. 12, § 1).
[6] *Id*.
[7] Ex. 24 at Art. 12, § 1.
[8] Exs. C and G; Zierke Test.; Wersal Test; Clayton Test. (In the end, the money was never allocated given the RPM's financial difficulties.)
[9] Clayton Test.; Testimony of Ronald Niemala and Timothy Kinley.

Ron Carey and Tony Sutton, and other Party Officials have on occasion attended meetings of the Judicial District Republican Chairs Committee.[10]

7. The Respondent has been a member of the Judicial District Republican Chairs Committee since it was formed in about 2005.[11]

8. In addition to the Judicial District Committees and the Judicial District Chairs Committee, the RPM Constitution provides for the creation of various convention committees to assist with carrying out the work of RPM State Convention.[12] Once the State Convention is over, these committees typically disband. One of the State Convention committees is the "Judicial Election Committee." Its purpose is to review and encourage possible candidates for endorsement as well as to prepare a voters' guide on all judicial candidates and incumbent justices of the Minnesota Supreme Court and Court of Appeals.[13]

9. The RPM began endorsing judicial candidates for statewide and district races in 2004. In 2010, for example, the RPM endorsed three candidates for appellate court positions: Greg Wersal and Tim Tinglestad for the Minnesota Supreme Court, and Dan Griffith for the Minnesota Court of Appeals.[14] All three candidates lost.

10. The RPM Constitution provides that the Party shall consider at its state convention whether to endorse candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals.[15] The Constitution states that the chair of the Judicial Election Committee will offer a report at the state convention regarding whether the Party should endorse candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals.[16] Following this report, the state convention delegates vote on whether endorsement should be considered. If the delegates vote in favor of endorsing candidates, then they vote on the endorsement of a person for the particular office of the Minnesota Supreme Court or Minnesota Court of Appeals.[17]

11. The RPM Constitution also states that within 14 days of the close of candidate filings for Minnesota Supreme Court and Minnesota Court of Appeals, the Judicial Election Committee will present its voters' guide for approval to the RPM Executive Committee for approval.[18]

12. Respondent was the Chair of the RPM's Judicial Elections Committee in 2008 and 2010. In 2012, Pat Shortridge, Chair of the RPM, removed Respondent as Chair of the Judicial Elections Committee. Respondent remained a member of the

[10] Clayton Test.
[11] Clayton Test.
[12] Ex. 24 at Art. 6; Zierke Test.
[13] Ex. 24 at Art. 6B.
[14] Niska Test.; Ex. 3.
[15] Ex. 24 at Art. 5, § 3C.
[16] *Id*. at Art. 6C.
[17] Ex. 24 at Art. 5, § 3C.
[18] *Id*. at Art. 6D and 6E.

Judicial Elections Committee, however, and as a member he led the effort to recruit candidates for statewide judicial office.[19]

13. On or about April 24, 2012, Respondent sent an email to RPM Judicial District delegates requesting recommendations for statewide judicial candidates. Respondent indicated that the RPM State Convention Judicial Elections Committee would be making recommendations for endorsement at the May 2012 RPM State Convention and noted that the RPM needed more candidates for the Minnesota Supreme Court and Appellate Court races. The Respondent closed the email as follows: "Bonn Clayton, Republican Judicial District Chairs, RPM Judicial Election Committee."[20]

14. The three Minnesota Supreme Court seats that were up for election in 2012 were all held by jurists who had been appointed by former Republican Governor Tim Pawlenty: Chief Justice Lorie Gildea, Justice G. Barry Anderson, and Justice David Stras.

15. The RPM State Convention took place in St. Cloud on May 18 and 19, 2012.

16. During the convention, Respondent and the Convention's Judicial Elections Committee advocated for the RPM to endorse three Minnesota Supreme Court candidates at the convention. Specifically, they sought the RPM's endorsement for Tim Tinglestad, Dan Griffith, and Dean Barkley. After a spirited discussion, the delegates at the RPM State Convention ultimately voted not to endorse any statewide judicial candidates.[21] As a result, no judicial candidate had the endorsement of the RPM in the November 2012 general election.

17. According to the RPM Constitution, only endorsements "made at a convention that is representative of the entire electorate for the office" may receive the commitment of party resources, finances and volunteers.[22] The RPM Constitution provides that an endorsement for public office at a convention below the level of the one representative of the entire electorate for the office "shall be no more than an expression of the sentiment of the convention."[23]

18. Respondent was unhappy with the decision by the delegates not to endorse judicial candidates.

19. On September 27, 2012, the Respondent sent an email to First Judicial District delegates informing them that the First Judicial District Republican Committee held an endorsing convention and unanimously endorsed Brian Gravely for First Judicial

[19] Zierke Test.
[20] Ex. 1; Clayton Test.
[21] Niska Test.; Ex. 2.
[22] Ex. 24 at Art. 5 § 3A(6).
[23] *Id*.

District Court judge, and Tim Tinglestad and Dan Griffin for the Minnesota Supreme Court.[24]

20. The RPM Judicial Chairs Committee and the First Judicial District Committee do not have the authority under the RPM Constitution to endorse candidates for statewide judicial office.[25]

21. In mid-October 2012, the Respondent and members of the Judicial District Republican Chairs Committee created a website called: www.judgeourjudgesmn.com to provide information on judicial candidates that support Republican initiatives favored by the Judicial District Republican Chairs, such as removing the term "incumbent" from judicial ballots and requiring that district court judges be elected by the people they serve.[26]

22. On October 18, 2012, the Respondent sent an email with the subject heading, "Which Judges should I vote for?," to a list of RPM Judicial District Delegates and Alternates. The Respondent obtained the list, which included more than 7,000 people, from local units of the RPM known as "Basic Political Operating Units" or BPOUs and from the Party Chairs of Congressional Districts (CDs).[27] In the email, the Respondent stated that "Party leaders" had put together a Voters' Guide in response to many calls from voters wondering who they should vote for in the judicial races.[28] Respondent encouraged recipients of the email to go to the judgeourjudgesmn website and view the Voters' Guide. Respondent also requested that recipients of the email send the website link to "all of your BPOU precinct delegates and alternates and Caucus Attendees, so that Republican voters will be able to vote for the right candidates."[29] The Respondent signed the email: "Bonn Clayton, Convener, Judicial District Republican Chairs, Republican Party of Minnesota."[30]

23. Recipients of Respondent's October 18th email and others who viewed the judgeourjudgesmn website on or about October 18, 2012, saw centered at the top of the website's home page in approximately 11-point font the heading: "Republican Party of Minnesota – Judicial District Chairs Committee." Centered underneath that heading, in large 18-point font, was the caption: "2012 Minnesota Judicial Voters' Guide."[31] The text that followed was written in letter format and was authored by the Respondent, who identified himself at the end of the text as: "Bonn Clayton, Convener, Judicial District Republican Chairs, Republican Party of Minnesota."[32] To the right of the text was a list of three Minnesota Supreme Court candidates and four district court candidates with links to information about each candidate.[33]

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[24] Ex. 19
[25] Zierke Test.
[26] Ex. 5; Testimony of Timothy Kinley.
[27] Clayton Test.; Niska Test.
[28] Ex. 4.
[29] Ex. 4.
[30] *Id*.
[31] Ex. 5.
[32] Ex. 5.
[33] Ex. 5.

24. The text of the homepage of the judgeourjudgesmn 2012 Minnesota Judicial Voters' Guide was written by Respondent and advocated for the election of the seven judicial candidates listed. Viewers were informed that the identified candidates were "strongly recommended" by the Judicial District Republican Chairs Committee and they were encouraged to vote for the candidates and to tell others to do the same. The Respondent included a disclaimer in 10-point font that ran across the very bottom of the web page and stated: "Prepared and paid for by: Republican Party of Minnesota – Judicial District Republican Chairs."[34]

25. Viewers of the website's homepage who selected the link leading to more information on candidate Tim Tinglestad were directed to a page dedicated to Mr. Tinglestad's candidacy.[35]

26. Like the judgeourjudgesmn home page, the Tinglestad page also had the heading "Republican Party of Minnesota – Judicial District Chairs Committee" centered at the top. Underneath that heading was a photo of Mr. Tinglestad followed by three paragraphs of text highlighting the difference between him and his opponent, Minnesota Supreme Court Justice David Stras. Mr. Tinglestad drafted the text at the request of the Respondent, who asked Mr. Tinglestad to contrast himself with Justice Stras. Mr. Tinglestad submitted the text and his photo to the Respondent for publication on the website. In the text, Mr. Tinglestad, who serves as a Magistrate for the Ninth Judicial District, emphasizes his belief in a "constitutional right to meaningful judicial elections" and includes the following statement:

> David Stras supports the plan to replace our constitutional right to meaningful judicial elections with an impeachment process called Merit Selection with Retention Elections.[36]

27. Mr. Tinglestad has never spoken to Justice Stras and was unaware of any statements made by him regarding judicial elections that were published in candidate questionnaires or elsewhere. Mr. Tinglestad researched articles online and generally got the impression that Justice Stras was in favor of retention elections (recommended by the Quie Commission) over the current judicial election process.[37]

28. Mr. Tinglestad is unable to recall any specific article that he read that lead him to conclude Justice Stras favors replacing the current judicial election process with retention elections.[38]

29. A disclaimer included at the bottom of the Tinglestad web page stated: "Prepared and paid for by Republican Party of Minnesota – Judicial District Republican Chairs. Bonn Clayton – busware@aol.com."[39]

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[34] Ex. 5.
[35] Ex. 6.
[36] *Id*.
[37] Testimony of Timothy Tinglestad.
[38] Tinglestad Test.
[39] *Id*.

30. Mr. Tinglestad did not draft or include the disclaimer in the material he submitted to the Respondent for publication on the website.[40]

31. Greg Wersal, an attorney and advisor to the Judicial District Republican Chairs Committee, believes that Justice Stras favors the retention election system proposed by the Quie Commission. Mr. Wersal attended a seminar at the University of Minnesota in April 2011 sponsored by the Federalist Society at which Justice Stras was the featured speaker. Mr. Wersal spoke with Justice Stras at a reception following his presentation. Based on this conversation, Mr. Wersal formed the opinion that Justice Stras supports the renewal of judicial terms through retention elections over the current judicial election process. Mr. Wersal may have communicated his opinion regarding Justice Stras to Mr. Tinglestad.[41]

32. Ben Zierke, Executive Director of the RPM, received a number of telephone calls from people who had visited the judgeourjudgesmn website and/or had received Respondent's October 18th email and were confused about whether the RPM had endorsed judicial candidates.[42]

33. To address the confusion caused by the judgeourjudgesmn website and Respondent's email, the RPM decided to issue its own email to RPM activists clarifying that it had not endorsed any statewide judicial candidates in 2012.[43]

34. At the end of the day on October 19, 2012, Pat Shortridge and David Asp, Chair of the RPM Judicial Committee, sent an email to the Party's master list of RPM delegates clarifying that the RPM had not endorsed any statewide judicial candidates in 2012 in conformance with the express decision of the delegates at the state RPM convention. Mr. Shortridge and Mr. Asp referenced the recent dissemination of "misleading" emails and an unofficial "voter's guide" that imply the RPM is supporting three judicial candidates. Mr. Shortridge and Mr. Asp warned recipients to be wary of the information contained in the emails and unauthorized voter's guide as they include misleading statements and improperly imply that the RPM endorses particular candidates. In response to this misinformation, Mr. Shortridge and Mr. Asp announced that the RPM had created an "official judicial election guide" and included a link to it for voters to educate themselves generally about the judicial candidates. Mr. Shortridge and Mr. Asp closed the email by requesting recipients forward the official RPM voter guide to all interested Minnesotans.[44]

35. For approximately two days after October 25, 2012, the judgeourjudgesmn website was taken down and was not accessible on the internet. The site was back up on or about October 27, 2012. In an email announcing that the website was back up, the Respondent referred to himself as: "Bonn Clayton, Convener, MN Judicial District Republican Chairs" eliminating the reference to "Republican Party of Minnesota."

[40] Tinglestad Test.
[41] Testimony of Greg Wersal.
[42] Zierke Test.
[43] Zierke Test.; Ex. 8.
[44] Ex. 8. *See also*, Ex. 9.

However, as of October 27, 2012, the disclaimer stating that the site was prepared and paid for by the "Republican Party of Minnesota – Judicial District Republican Chairs" remained at the bottom of the site's home page.[45]

36. In a newspaper questionnaire directed at Minnesota Supreme Court candidates and posted online on October 26, 2012,[46] Justice David Stras stated that he took "no position" on the proposed judicial retention election system. Justice Stras stated that "the decision about how to select judges is committed to the people and the legislature, not the judicial branch." Justice Stras noted that the constitution's separation of powers provided a reason for judges and judicial candidates to decline to comment about matters "beyond the scope of the job."[47] Justice Stras made similar comments during a radio news program interview sometime in the weeks prior to the election.[48]

37. In late October and early November 2012, the Respondent sent additional emails to RPM Judicial District and Convention delegates encouraging them to vote for the judicial candidates identified on the judgeourjudgesmn website.[49] In the emails, the Respondent used the name "Republican Party of Minnesota" or the initials "RPM."[50] The Respondent also used terms like "delegates" and "BPOU," which have specific meanings to activists and members of the RPM and implied that the information was sanctioned by the RPM.[51]

38. On or about October 29, 2012, Richard Morgan, counsel for the RPM, sent the Respondent an email regarding the "2012 Minnesota Judicial Voters' Guide" on the judgeourjudgesmn website. Mr. Morgan reminded the Respondent that the RPM had not endorsed any judicial candidate in the November 2012 general election. Mr. Morgan expressed concern that use of the RPM name on the website would lead to confusion regarding the judicial endorsements. As a result, Mr. Morgan directed the Respondent to immediately remove the RPM disclaimer from the website and to advise all recipients of emails connected with the 2012 Minnesota Judicial Voters' Guide that the use of the RPM disclaimer was a mistake. Mr. Morgan warned the Respondent that his failure to do so might lead to a complaint being filed with the Office of Administrative Hearings.[52]

39. On October 30, 2012, the Respondent sent an email to Mr. Morgan informing him that the Judicial District Republican Chairs Committee had changed the wording of the disclaimer on the judgeourjudgesmn website. The revised disclaimer stated: "Prepared and paid for by the First Judicial District Republican Committee of the

[45] Exs. 5 and 10; Niska Test; Zierke Test.
[46] Ex. 7 (posted on the *Mille Lacs Messenger* website at www.messengermedia.com).
[47] Ex. 7 at 13.
[48] Niska Test.
[49] Exs. 10, 14 and 15.
[50] Exs. 14 and 15.
[51] *Id*.; Niska Test.
[52] Ex. 11.

Republican Party of Minnesota."[53] The Respondent also noted in his email to Mr. Morgan that the Judicial District Republican Chairs Committee has existed for "more than 10 years," meets regularly, sometimes at the RPM headquarters, and has had budget items approved by the RPM.[54]

40. In an email to the Respondent sent on October 31, 2012, Mr. Morgan informed the Respondent that the new disclaimer had been reviewed and was found to still be unacceptable. Mr. Morgan stated that the RPM would file a complaint.[55]

41. On November 2, 2012, the Respondent issued an email to the RPM "Judicial Delegates" on behalf of the Chairs of the "Minnesota Judicial District Republican Committees" encouraging them to vote for Dean Barkley over Justice Barry Anderson. The Respondent stated that the Minnesota Judicial District Republican Committees decided to recommend Dean Barkley because Justice Barry Anderson:

> voted against Pawlenty on unallotment, he voted against Sen. Scott Newman when Newman challenged the validity of a Ramsey County judge's [sic] establishing a State Government Budget during the government Shutdown in 2011, and he has consistently supported unconstitutional campaign restrictions on judicial candidates (enacted by the State Supreme Court) which the Republican Party has challenged all the way to the US Supreme Court (and we won!). He has generally sided with the liberal majority on the Court.[56]

42. The Respondent drafted the November 2, 2012, email himself. He did not research the three cases he referenced because he felt he did not have the time to verify the accuracy of the statements so close to the election and he believed each of the statements was accurate.[57]

43. The Respondent indicated that he believed Justice Barry Anderson voted against Governor Pawlenty on the unallotment case based generally on something he read in the *Star Tribune* newspaper. Likewise, he believed Justice Barry Anderson voted against Senator Scott Newman and others based on something he read in the *Star Tribune* newspaper. The Respondent did not identify on what he based his belief that Justice Barry Anderson supported "unconstitutional campaign restrictions."[58]

44. Respondent's statement in the November 2nd email regarding the "unallotment case" refers to *Brayton v. Pawlenty*,[59] in which the majority of the Minnesota Supreme Court struck down then Governor Pawlenty's use of unallotment as

[53] Clayton Test.
[54] Ex. D.
[55] Ex. E.
[56] Ex. 15.
[57] Clayton Test.
[58] Clayton Test.
[59] 781 N.W.2d 357, 372 (Minn. 2010); See, Ex. 16.

a violation of the separation of powers. Justice Barry Anderson, however, joined Chief Justice Lorie Gildea's dissent in support of Governor Pawlenty's unallotment authority.[60]

45. Respondent's statement in the November 2nd email regarding Senator Scott Newman refers to *Limmer et al. v. Swanson,*[61] a case brought by four Republican Minnesota Senators and two Republican members of the Minnesota House challenging a Ramsey County District Court Judge's authority to carry out budgetary functions and approve spending on behalf of the State during the state government shutdown in 2011. The Minnesota Supreme Court ultimately dismissed the case as moot once the legislature and governor resolved the government shutdown and appropriation bills for all state agencies were passed and signed into law. Justice Barry Anderson joined the six-justice majority in dismissing the lawsuit as moot.[62]

46. The Respondent's statement in the November 2nd email regarding campaign restrictions that the Republican Party challenged in the United States Supreme Court refers to *Republican Party of Minnesota v. White*.[63] This case was decided in 2002, two years before Justice Barry Anderson joined the Minnesota Supreme Court.[64]

47. On November 4, 2012, Greg Wersal sent an email to Richard Morgan in response to his October 29th request that Respondent remove the RPM disclaimer from the judgeourjudgesmn website and notify email recipients that use of the RPM disclaimer was a mistake. Mr. Wersal stated that "Minn. Stat. § 211B.02 does permit an organization within a major political party to issue a statement of support for a candidate."[65] Mr. Wersal noted that the term "organization" is not defined in Chapter 211B and he pointed out to Mr. Morgan that the Judicial District Chairs Committee has existed for 10 years and meets regularly. Mr. Wersal closed his correspondence by suggesting that the parties resolve their issues rather than "proceed down the road to endless litigation."[66]

48. Justices Lorie Gildea, Barry Anderson and David Stras were all re-elected on November 6, 2012.

49. The campaign complaint in this matter was filed with the Office of Administrative Hearings on November 7, 2012.

50. Mr. Wersal and members of the Judicial District Republican Chairs Committee met shortly after the filing of this complaint. Two members continued to express the erroneous belief that Justice Barry Anderson voted against Governor Pawlenty in the unallotment case.[67] Mr. Wersal informed the Respondent and the

[60] *Id*.
[61] A11-1222 (Minn. Nov. 30, 2011); Ex. 17.
[62] *Id*.
[63] 536 U.S. 765 (2002); Ex. 18.
[64] Ex. 18.
[65] Ex. F.
[66] Ex. F; Wersal Test.
[67] Wersal Test.

others at the meeting that Justice Barry Anderson did not vote against Governor Pawlenty in that case.[68]

Based upon the foregoing Findings of Fact, the undersigned Panel of Administrative Law Judges makes the following:

CONCLUSIONS

1. The Administrative Law Judge Panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35.

2. Minnesota Statutes § 211B.02 provides:

> **211B.02 False Claim of Support.**
>
> A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

3. The burden of proving the allegations in the Complaint is on the Complainant.

4. The standard of proof of a violation of Minn. Stat. § 211B.02 is a preponderance of the evidence.[69]

5. Minnesota Statutes Chapter 211B does not define the term "party unit." The term is defined in Chapter 10A, which governs the Campaign Finance and Public Disclosure Board, to mean "the state committee or the party organization within a house or the legislature, congressional district, county, legislative district, municipality or precinct."[70]

6. The Complainant has established by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.02 by knowingly making a false claim implying that the RPM, a major political party, supported or endorsed three candidates for the Minnesota Supreme Court in the November 2102 general election.

7. Minnesota Statutes § 211B.06, subd. 1, provides in part:

> A person is guilty of a misdemeanor who intentionally participates in the preparation, [or] dissemination … of … campaign material with respect to the personal or political character or acts of a candidate …

[68] *Id*.
[69] Minn. Stat. § 211B.32, subd. 4.
[70] Minn. Stat. § 10A.01, subd. 30.

> that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office …, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

8. The standard of proof of a violation of Minn. Stat. § 211B.06 is clear and convincing evidence.[71]

9. Minn. Stat. § 211B.01, subd. 2, defines "campaign material" to mean "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media."

10. The Respondent's emails at issue in this matter and the judgeourjudgesmn website are campaign material within the meaning of Minn. Stat. § 211B.01, subd. 2.

11. The Complaint alleged that the Respondent knowingly prepared and/or disseminated four factually false statements, or communicated these statements with reckless disregard as to whether they were false in violation of Minn. Stat. § 211B.06.

12. The Complainant has failed to establish by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06 with respect to the first statement identified in the Complaint: "David Stras supports the plan to replace our constitutional right to meaningful elections with an impeachment process called Merit Selection and Retention Elections."

13. The Complainant has established by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06 with respect to the second statement identified in the Complaint: "[Justice Barry Anderson] voted against Pawlenty on unallotment." The Complainant has shown that the statement is factually false and that Respondent prepared and disseminated the statement with reckless disregard as to whether it was false.

14. The Complainant has failed to establish by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06 with respect to the third statement identified in the Complaint: "[Justice Barry Anderson] voted against Scott Newman when Newman challenged the validity of a Ramsey County judge's [sic] establishing a State Government Budget during the government shutdown in 2011."

15. The Complainant has also failed to establish by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06 with respect to the fourth statement identified in the Complaint: "[Justice Barry Anderson] has consistently supported unconstitutional campaign restrictions on judicial candidates …"

16. The attached Memorandum explains the reasons for these Conclusions and is incorporated by reference.

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[71] Minn. Stat. § 211B.32, subd. 4.

Based on the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

ORDER

IT IS ORDERED:

That having been found to have violated Minn. Stat. §§ 211B.02 and 211B.06, Respondent Bonn Clayton shall pay a civil penalty in the amount of $1,200 by June 15, 2013.[72]

Dated: March 12, 2013

/s/ Barbara L. Neilson for _____
JEANNE M. COCHRAN
Presiding Administrative Law Judge

/s/ James LaFave_____
JAMES E. LAFAVE
Administrative Law Judge

/s/ Miriam Rykken_____
MIRIAM P. RYKKEN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5, this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

The Complaint alleges that the Respondent, a long-time active member of the RPM, violated Minnesota Statutes §§ 211B.02 and 211B.06 in preparing and disseminating campaign material advocating for the election of three candidates for the Minnesota Supreme Court in the November 2012 general election.

[72] The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, P.O. Box 64620, St. Paul, MN 55164-0620.

False Implication of Endorsement or Support – 211B.02

The Respondent is an experienced and active member of the Republican Party of Minnesota. He is the Chair of the First Judicial District Republican Committee, and was a member of the RPM's 2012 Judicial Elections Committee. The Respondent attended the RPM State Convention and was aware that the delegates voted not to endorse any statewide judicial candidates in the 2012 general election. Despite the Party's decision not to endorse statewide judicial candidates, the Respondent prepared and disseminated emails and published material on the judgeourjudgesmn website that advocated for the election of three Minnesota Supreme Court candidates and included the name "Republican Party of Minnesota" or initials "RPM." In particular, the website's heading stated: "Republican Party of Minnesota – Judicial District Chairs Committee" and a disclaimer at the bottom read: "Prepared and paid for by: Republican Party of Minnesota – Judicial District Republican Chairs."

The Complaint alleges that by preparing and publishing the emails and website using the RPM name and initials, the Respondent knowingly implied that the judicial candidates had the support or endorsement of the Republican Party of Minnesota in violation of Minn. Stat. § 211B.02.

The Respondent argues that he did not knowingly violate Minn. Stat. § 211B.02. First, he argues that his emails and the judgeourjudgesmn website were intended for RPM delegates and alternates and not for the "world at large." The Respondent asserts that the Party delegates and alternates are sophisticated Party members who were already aware that the RPM had not endorsed statewide judicial candidates and would not have read the material as implying RPM endorsement or support. The Respondent also points out that he never used the word "endorsed" in his material and instead used only the phrase "strongly recommended." In addition, the Respondent maintains that he modified references to the "RPM" by adding the title of the Judicial District Republican Chairs Committee to avoid an implication of official RPM endorsement. Finally, the Respondent asserts that the Judicial District Republican Chairs Committee is a "party unit" of the RPM and, as such, its communication of support for the judicial candidates did not violate § 211B.02.

Minn. Stat. § 211B.02 provides that a person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate has the support or endorsement of a major political party or party unit. In *Schmitt v. McLaughlin,*[73] the Minnesota Supreme Court held that an unendorsed candidate's use of the initials "DFL" violated the statute because it implied to the average voter that the candidate had the endorsement or at the very least the support of the DFL Party.

In *Matter of Ryan*,[74] a case with similarities to this one, a non-endorsed candidate for County Commissioner distributed campaign brochures and lawn signs with the initials "DFL" and the words "LABOR ENDORSED" in large capital block letters.

[73] 275 N.W.2d 587.
[74] 303 N.W.2d 462 (Minn. 1981).

Between "DFL" and "LABOR ENDORSED," in small lettering, was the phrase "47 'District 5' Secretary" or "47 'Secretary Sen. Dist.,'" which referred to a DFL party office the candidate held in the 47th Senate District. The candidate argued that the use of his party office on the campaign material was intended to modify "DFL" as an indication of party affiliation and not endorsement. The candidate insisted that he did not intend to violate the statute and that he made a conscious attempt to comply with the law.[75]

The Court rejected the candidate's argument that his party office modified "DFL" and found that the use of the initials "DFL" without the modifying language authorized in *Schmitt* implied party endorsement. However, in determining whether the candidate's false implication of party support was made knowingly, the Court declined to interpret "knowingly" to mean "deliberate." Instead, the Court held that the candidate may be said to have "knowingly" violated the statute "if he knew that his literature falsely claimed or implied that he had party support or endorsement."[76] In order to make this determination, the Court explained that the candidate's testimony had to be examined together with the circumstances surrounding the preparation of the campaign material. The Court noted that the candidate was an experienced party regular who had run in a number of elections and had acknowledged familiarity with both the statute and the *Schmitt* case. Based on all of this, the Court held that by not using the precise modifying language authorized by the *Schmitt* court, the candidate consciously took the risk that his interpretation of the law was not correct.[77]

Finally, in *Daugherty v. Hilary*,[78] a candidate for alderman for the Third Ward of Minneapolis distributed "Official Sample Ballots," which the Court found falsely implied that the candidate was endorsed by the DFL party. The Court concluded that when taken as a whole, the candidate's sample ballot was a thinly disguised attempt to directly imply that the document was the DFL sample ballot, thus falsely implying the candidate was the DFL endorsed candidate. The Court concluded that the candidate "consciously undertook to derive as much benefit as possible from the voter's familiarity with party sample ballots short of an outright claim of endorsement."[79] Thus, the Court found the candidate's violation was committed knowingly.

The Panel concludes that by using the name "Republican Party of Minnesota" and "RPM" in the emails and on the website, the Respondent falsely implied to average voters that three Minnesota Supreme Court candidates had the endorsement or, at the very least, the support of the RPM – a major political party. The Panel rejects the Respondent's argument that because the email was intended for Party regulars, a false implication should not be found. There is no exception to the prohibition against false implications of support made only to party members. Moreover, the record established that the emails did cause confusion among Party members about whether the RPM had changed its position since the state convention and was now endorsing these candidates. In addition, the Respondent encouraged the 7,000 email recipients to

[75] 303 N.W.2d at 467.
[76] 303 N.W.2d at 467.
[77] 303 N.W.2d at 468. (Minn. Stat. § 210A.02 is the predecessor to Minn. Stat. § 211B.02.)
[78] 344 N.W.2d 826 (Minn. 1984).
[79] 344 N.W. 2d at 831.

"send the link [to the website's voters' guide] to anybody else you can think of!" Given that directive, the Respondent cannot maintain that the email was only intended for a select audience and not for "the world at large."

The Panel also rejects the Respondent's claim that he did not violate Minn. Stat. § 211B.02 because the Judicial District Republican Chairs Committee, as a "party unit," could endorse statewide judicial candidates. Regardless of whether the Judicial District Republican Chairs Committee is a "party unit" within the meaning of 211B.02, Respondent implied that the RPM itself had endorsed or supported the candidates when he used the RPM's name and initials in the campaign material. The emails and website went beyond simply communicating the Committee's support and instead falsely implied the candidates had the support of the Republican Party of Minnesota.

The Panel finds further that Respondent knowingly violated the statute. The Respondent is an experienced Party regular who was well aware of the RPM's official position regarding endorsing statewide judicial candidates. Despite the delegates decision at the State Convention, the Respondent designed the website's "Judicial Voters' Guide" and used the Party's name and terms such as BPOU to imply that the material was authorized by the RPM and that the RPM supported the three identified judicial candidates.

The Respondent also raised the argument that the Complainant, Mr. Niska, lacked standing to bring this Complaint as this is a matter between the RPM and the Respondent. The Respondent asserts that allowing third parties to file complaints "on behalf of others" is an abuse of process that will chill free speech. The Fair Campaign Practices Act does not limit who may file a complaint.[80] However, Minnesota election law specifically provides that any eligible voter may contest the election of a person for whom they had to right to vote.[81] This suggests that the Legislature favors a broad interpretation of standing. And it seems logical that each eligible voter may be injured by false claims of endorsement or other false statements in campaign material. The Complainant is an eligible voter and a RPM member. As such, he may properly complain of violations of Minn. Stat. Ch. 211B.

Finally, as a general rule, neither an administrative law judge nor an administrative agency has authority to declare a statute unconstitutional on its face. An administrative law judge or an agency may properly consider, however, whether a statute is unconstitutional as applied to the particular facts of a case.[82] With respect to the Respondent's general arguments that Minn. Stat. § 211B.02 is unconstitutional, the Panel notes that in *Schmitt v. McLaughlin*,[83] the Minnesota Supreme Court rejected a facial challenge to Minn. Stat. § 210A.02 (the predecessor to § 211B.02) concluding that

[80] See, Minn. Stat. § 211B.32.
[81] Minn. Stat. § 209.02, subd. 1.
[82] The power to declare a law unconstitutional in all settings is vested with the judicial branch of state government. *See*, *Neeland v. Clearwater Memorial Hosp*., 257 N.W.2d 366, 368 (Minn. 1977); *In the Matter of Rochester Ambulance Serv.*, 500 N.W.2d 495, 499-500 (Minn. App. 1993). *See also*, G. Beck, Minnesota Administrative Procedure § 11.5 (2d ed. 1998).
[83] 275 N.W.2d at 590-591.

since the statute regulates only false claims of endorsement, it was narrowly drawn to serve a governmental interest in protecting the political process.[84] Whether that decision remains good law in light of the U.S. Supreme Court's recent ruling in *United States v, Alvarez*,[85] is not for this Panel to decide.

False Campaign Material – 211B.06

Minn. Stat. § 211B.06 prohibits a person from intentionally participating in the preparation or dissemination of campaign material with respect to the personal or political character or acts of a candidate that is designed or tends to injure or defeat a candidate, and which the person knows is false or communicates to others with reckless disregard of whether it is false. As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact. It is not intended to prevent criticism of candidates for office or to prevent unfavorable deductions or inferences derived from a candidate's conduct. In addition, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.[86]

The burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.[87] A statement is substantially accurate if its "gist" or "sting" is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced. Where there is no dispute as to the underlying facts, the question whether a statement is substantially accurate is one of law.[88]

The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.[89] Based upon this standard, the Complainant has the burden to prove by clear and convincing evidence that the Respondent either published the statements knowing the statements were false, or that he "in fact entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness" of its probable falsity.[90] A statement may have been made with

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[84] *Id*, discussing Minn. Stat. § 210A.02 (predecessor to § 211B.02).
[85] 567 U.S. ___ (June 28, 2012) (Supreme Court overturned law making it a crime to falsely claim to have earned a military decoration as an unconstitutional infringement on First Amendment right to free speech. Court held that First Amendment requires there be a direct causal link between the restriction imposed and the injury to be prevented.)
[86] *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).
[87] *Jadwin*, 390 N.W.2d at 441.
[88] *Id*.
[89] *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *State v. Jude*, 554 N.W.2d 750, 754 (Minn. App. 1996).
[90] *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); see also *Riley v. Jankowski*, 713 N.W.2d 379, 401 (Minn. App. 2006), *rev. denied* (Minn. July 20, 2006).

actual malice if it is fabricated or is so inherently improbable that only a reckless man would put it in circulation.[91]

To be found to have violated section 211B.06, therefore, two requirements must be met: (1) a person must intentionally participate in the preparation or dissemination of false campaign material; and (2) the person preparing or disseminating the material must know that the item is false, or act with reckless disregard as to whether it is false. As to the first element of the statute, the test is objective: The statute is directed against false statements of fact. With respect to the second element of the statute – namely, Respondent's awareness surrounding the claims he made – the test is subjective: The Complainant must show that the Respondent "entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness" of its probable falsity.[92] Otherwise, his claim for relief fails.

The Complaint identified four statements that were either prepared or disseminated by the Respondent that the Complainant contends are factually false. The Complainant maintains that the Respondent knew these statements were false or communicated them with reckless disregard as to their probable falsity.

A. First Statement: "David Stras supports the plan to replace our constitutional right to meaningful elections with an impeachment process called Merit Selection and Retention Elections"

The Complaint argues that the above statement which appeared on the judgeourjudgesmn website page devoted to Mr. Tinglestad's candidacy is false. The statement was drafted by Mr. Tinglestad and Respondent participated in publishing or disseminating it on the website. The Complainant contends the statement is false because Justice Stras has consistently declined to take any position on the proposed judicial election retention system, citing separation of powers principles. According to the Complainant, there is no evidence to support the claim that Justice Stras supports retention elections.

Mr. Tinglestad testified that he came to the conclusion that Justice Stras favors retention elections after conducting research on-line. Based on materials he read on-line, Mr. Tinglestad got the general impression that Justice Stras favors replacing the current judicial election system with the proposed merit selection and retention elections. Mr. Wersal, an advisor to the Judicial District Republican Chairs Committee, also formed the opinion that Justice Stras supports retention elections after talking to Justice Stras following a legal seminar at which Justice Stras was a featured speaker. Mr. Wersal indicated that he may have communicated his opinion regarding Justice Stras to Mr. Tinglestad.

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[91] *St. Amant*, 390 U.S. at 732.

[92] *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). *See also Riley v. Jankowski,* 713 N.W. 2d 379 (Minn. App.) *review denied* (Minn. 2006).

The Respondent asserts that he accepted Mr. Tinglestad's text for the website and assumed the statement was true. He also argues that the exception for publishers provided at Minn. Stat. § 211B.06, subd. 2 should apply in this case because he relied on the good character of Mr. Tinglestad and simply published what he provided.

The Panel concludes that the Complainant has failed to show by clear and convincing evidence that the statement is false. It is not enough for the Complainant to assert that there is no evidence to support the claim. The Complainant has the burden of coming forward with sufficient evidence to demonstrate that the statement is factually false. The fact that Justice Stras consistently took no position on the issue of judicial elections during the campaign is insufficient to establish that he did not support retention elections as claimed by Mr. Tinglestad. In addition, the Complainant has failed to establish that the Respondent disseminated the statement "with a high degree of awareness" of the statement's probable falsity. This allegation is dismissed.

The Panel notes, however, that the exception to Minn. Stat. 211B.06 provided for publishers would not apply in this case. The exception applies only if the person's *sole* act was the printing, manufacturing or dissemination of the false material. The exception would apply, for example, to a printing company or mailing center whose regular business is to print and produce materials for customers. The Respondent's role in creating, gathering and disseminating the information on the website went beyond the parameters of the exception contained in Minn. Stat. § 211B.06, subd. 2.

B. Second Statement: "[Justice Barry Anderson] voted against Pawlenty on unallotment"

The Complaint alleges that Respondent's statement in a November 2nd email to RPM Judicial Delegates that Justice Barry Anderson "voted against" Governor Pawlenty on unallotment is false and that Respondent communicated the statement with reckless disregard as to whether it was false. The statement refers to the case of *Brayton v. Pawlenty*,[93] in which the majority of the Minnesota Supreme Court struck down then Governor Pawlenty's use of unallotment as a violation of separation of powers. Justice Barry Anderson, however, joined Chief Justice Lorie Gildea's dissent in support of Governor Pawlenty's unallotment authority.[94] The *Brayton* decision was issued in May 2010, and the Complainant argues that the Respondent could have easily determined that his statement was false with very brief research. Instead, the Complainant argues, the Respondent willfully ignored the truth and disseminated a false claim about Justice Anderson's vote in *Brayton*.

The Respondent asserts that he thought Justice Barry Anderson did vote against Governor Pawlenty in the *Brayton* case based on "something" he read possibly in the *Star Tribune* newspaper. Other members of the Judicial District Republican Chairs Committee also thought that Justice Barry Anderson had voted against Governor Pawlenty. Because he believed the statement was true and because the election was

[93] 781 N.W.2d 357, 372 (Minn. 2010); See, Ex. 16.
[94] *Id*.

only a few days away, the Respondent felt he did not have the time to verify his claims made in his November 2nd email. The Respondent explained that the remaining days before an election are a chaotic time and that decisions must be made in "the fog of war."

The statement is factually false. The issue before the Panel is whether the Respondent communicated it with reckless disregard as to whether it is false. As the U.S. Supreme Court has noted, there is not one precise definition of "reckless disregard." Inevitably, its outer limits must be marked through case-by-case adjudication. A respondent cannot automatically ensure a favorable decision by testifying that he published with a belief that the statements were true.[95] A statement may have been made with actual malice if it

> is fabricated by the defendant, is the product of his imagination, . . . is based wholly on an unverified anonymous telephone call [or if] the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his report.[96]

In determining whether a respondent had serious doubts about the truth of his statement, the panel must assess the information available when the statement was made, including the identities of the sources and what those sources said. Evidence that there were no sources, that the sources were unreliable or uninformed, or that the information provided by the source was misrepresented may prove the requisite mental state.[97]

Here, the Respondent claims that he thought his statement regarding how Justice Barry Anderson voted in the unallotment case was true based on a vague recollection he had of something he read in the *Star Tribune*. The Panel finds Respondent's explanation is not plausible. The vagueness of his recollection on this point when he otherwise provided very detailed testimony on past events, demonstrates that the Respondent's claim that he had no doubt as to the statement's accuracy is not credible. The Respondent testified that he had no clear memory of the article on which his statement is based. Given this, the Panel concludes that the Respondent had serious doubts as to the content of the article and the accuracy of his statement. Moreover, as this Office has held in *Martin v. Republican Party of Minnesota*[98] and *Olseen v. Barrett*,[99] the Panel finds that by citing to the *Brayton* decision, the Respondent is charged with knowing it. The Respondent could have discovered that

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[95] *St. Amant*, 390 U.S. at 732; *Eastwood v. National Enquirer, Inc.,* 123 F.3d 1249, 1253 (9th Cir. 1997) ("As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence.").
[96] *St. Amant*, 390 U.S. at 732.
[97] *See In re Charges of Unprofessional Conduct Involving File No. 17139*, 720 N.W.2d 807, 815-16 (Minn. 2006).
[98] OAH Case No. 7-0320-30106 (Dec. 7, 2012).
[99] OAH Case No. 60-0320-30172 (Feb. 5, 2013).

the statement was untrue by doing minimal research. The *Brayton* decision was issued in 2010, two years before Respondent's statement. It was a widely publicized decision. Instead of verifying how Justice Barry Anderson voted in the case, the Respondent made and disseminated the claim without regard to whether it was false or not. For the above reasons, the Panel finds that the Respondent violated Minn. Stat. § 211B.06.

C. Third Statement: [Justice Barry Anderson] voted against Scott Newman when Newman challenged the validity of a Ramsey County judge's establishing a State Government Budget during the government shutdown in 2011."

The Complainant contends that this statement is false because Justice Barry Anderson did not "vote" against Senator Newman's suit in *Limmer et al v. Swanson*, but instead voted with the majority that the suit was rendered moot by the subsequent budget agreement.

The Respondent asserts that the statement is not false but rather a fair interpretation of the ultimate outcome of the case. By having their suit dismissed, the legislators, including Senator Newman, lost. The Respondent argues that, as a non-lawyer, he may not have gotten the language precisely correct but he accurately conveyed how the average person would interpret the Court's decision. In addition, the Respondent maintains that there is no evidence that he entertained serious doubts when he published the statement.

The Panel concludes that the Complainant has failed to show by clear and convincing evidence that the statement is factually false. The statement reflects the interpretation that a vote to dismiss Senator Newman's lawsuit as moot, was a vote against Senator Newman. The statement may not be literally true in every detail, but the gist and sting is true.[100] In addition, the Complainant has failed to show that the Respondent acted with a "high degree of awareness" that the statement was probably false. The Minnesota Supreme Court has noted that "even a 'highly slanted perspective' . . . is not enough by itself to demonstrate actual malice."[101] This allegation is dismissed.

D. Fourth Statement: [Justice Barry Anderson] has consistently supported unconstitutional campaign restrictions on judicial candidates (enacted by the State Supreme Court) which the Republican Party has challenged all the way to the US Supreme Court (and we won!)."

The Complainant argues that this statement is false because the U.S. Supreme Court case referenced, *Republican Party of Minnesota v. White*, was decided in 2002, two years before Justice Barry Anderson joined the Minnesota Supreme Court. The *White* case struck down certain rules imposed on judicial candidates by the State's Code of Judicial Conduct.

[100] *Jadwin*, 390 N.W.2d at 441.
[101] *Chafoulias v. Peterson*, 668 N.W.2d 642, 655 (Minn. 2003).

The Respondent argues that the fact that Justice Barry Anderson was not a member of the Minnesota Supreme Court when the *White* decision was issued, is not dispositive of whether the statement is false. The Respondent points out that no evidence was presented as to whether Justice Anderson supported the ethics rules at issue in the *White* case prior to joining the bench. Without some evidence regarding Justice Anderson's position on the ethics rules, the Respondent maintains that the statement cannot be found to be factually false. Respondent also contends that he thought the statement was true when he disseminated it, and that he did not entertain serious doubts as to its truth.

The Panel concludes that the statement is too vague to form the basis of a Section 211B.06 claim. It is unclear what precisely the Respondent is referring to when he states that Justice Anderson has "consistently supported unconstitutional campaign restrictions." The Respondent did not state that Justice Anderson voted in a certain manner, which is a claim capable of being proven true or false. He states that Justice Anderson "consistently supported" campaign restrictions that the RPM challenged. While the U.S. Supreme Court did rule in the *White* case that the restrictions placed on judicial candidates regarding stating their views on legal or political issues violated candidates' First Amendment rights, the case was remanded for further consideration and the litigation did not end until 2006. It may be that the Respondent is stating that Justice Barry Anderson supported the ethics rules that were challenged in the *White* case prior to joining the bench. There is no evidence in the record as to Justice Anderson's position regarding the challenged ethics rules and the fact that he was not yet on the Minnesota Supreme Court when the *White* case was handed down is not enough to show that the statement is factually false. This allegation is dismissed.

Respondent's Constitutional Challenge

Finally, the Respondent argues that Minn. Stat. § 211B.06 is unconstitutionally overbroad. As discussed above, neither an administrative law judge nor an administrative agency has authority to declare a statute unconstitutional on its face.[102] The panel notes, however, that in a recent challenge to the restrictions on knowingly or recklessly false campaign speech under Minn. Stat. § 211B.06,[103] the Eighth Circuit held that knowingly false campaign speech falls within the protections of the First Amendment's right to free speech and, therefore, any regulation must satisfy the strict scrutiny test: that the restrictions be narrowly tailored to meet a compelling state interest.[104] The court remanded the case to the district court for further proceedings and in a subsequent decision, the U.S. District Court for the District of Minnesota recently held that Minn. Stat. § 211B.06 was not unconstitutionally overbroad with

[102] G. Beck, Minnesota Administrative Procedure § 11.5 (2d ed. 1998).
[103] *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011).
[104] 638 F.3d at 636. (The court remanded the case to the district court for further proceedings consistent with its order.) In *Schmitt v. McLaughlin*, 275 N.W.2d 587, 590-591 (Minn. 1979), the Minnesota Supreme Court rejected a facial challenge to Minn. Stat. § 211B.02's predecessor statute (§ 210A.02) holding that since the regulation was directed at false claims of endorsement, it was narrowly drawn to serve a governmental interest in protecting the political process.

respect to its restrictions on false speech about ballot questions.[105] The Court held that the ballot provisions of Minn. Stat. § 211B.06 reflect a legislative judgment on behalf of Minnesota citizens to guard against the "malicious manipulation of the political process" and that the statute's provisions are narrowly tailored to serve this compelling interest. Whether the restrictions at issue in this case would withstand strict scrutiny and be found constitutional is not for this Panel to decide.

The Panel finds that a $600 penalty for each statutory violation is appropriate in this case.

J.M.C., J.E.L, M.P.R.

[105] *281 CARE Committee v. Arneson*, Case No. 08-5215, 2013 WL 308901 (D.Minn. Jan. 25, 2013).